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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/715,965

11/18/2003

James D. Ralph

F-294

5392

51640

7590

03/28/2007

SPINE MP

LERNER, DAVID, et al.

600 SOUTH AVENUE WEST

WESTFIELD, NJ 07090

EXAMINER

PHILOGENE, PEDRO

ART UNIT

PAPER NUMBER

3733

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

03/28/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/715,965

Applicant(s)

RALPH ET AL.

Examiner

Pedro Philogene

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3733

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 February 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,4-10 and 20-32 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-10,20-32 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-2,5-10,20-32, are rejected under 35 U.S.C. 102(e) as being anticipated by Kohrs (6,855,166).

With respect to claims 1-2,5-10, 20-32, Kohrs discloses an intervertebral spacer device (100) comprising a spacer body dimensioned to fit between two vertebrae, the spacer body having a plurality of outer surfaces, a leading end and a trailing end, as best seen in FIG.6, the plurality of outer surfaces including a first outer surface or convexly curved upper surface (106) extending between the leading end and the trailing end of the spacer (100) and a second outer surface or a convexly curved lower surface (108) extending between the leading end and the trailing end of the spacer body (100), the upper and lower surfaces or the first and second outer surfaces facing away from one another, as best seen in FIG.6, the spacer body having a plurality of linear grooves (101, 102, 103, 104, 109, 110, 111, 120, 121, 122, 123) engageable by an intervertebral spacer insertion tool (500) having a plurality of linearly extending grooves engagement members, the plurality of linear grooves including a first linear groove formed in the first outer surface and a second linear groove formed in the second outer surface, the first

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and second linear grooves being parallel to one another (the grooves at the end (109) are parallel to grooves at the end (111)); as best seen in FIG.6. Each of the first and second outer surfaces is convex; as best seen in FIG.6. The first outer surface is an upper surface of the spacer body and the second outer surface is a lower surface of the spacer body; as best seen in FIG.6. The plurality of linear grooves comprises a first set of linear grooves formed in the first outer surface and a second set of linear grooves formed in the second outer surface, the first set of linear grooves being parallel to the second set of linear grooves; as best seen in FIG.6, each linear groove in the first set of linear grooves is directly opposite a respective one of the linear grooves in the second set of linear grooves; as best seen in FIG.6; the grooves are the parallel channels in the upper and lower convex surfaces in between (101, 103 and 102,104). The spacer body comprises a porous material, selected from porous metal, as set forth in column 3, lines 49-56, each of the first and second linear grooves has a smooth surface; as best seen in FIG.6, one of the first and second outer surfaces is rough, as best seen in the figures.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kohrs (6,855,166).

With respect to claims 4, it is noted that Kohrs did not teach of a pillow shape having rounded corners and rounded edges; as claimed by applicant. However, this particular configuration is nothing more than one of numerous configurations one of ordinary skill in the art would find obvious for the purpose of providing mating surfaces in the spacer of Kohrs. See *in re Dailey* 149 USPQ 47 (CCPA 1976).

Response to Amendment

Applicant's arguments filed 2/1/07 have been fully considered but they are not persuasive. Applicant stated: "clearly kohrs does not teach or suggest convexly curved surface that extend between leading and trailing ends of an implant". The examiner begs to differ. The implant of Kohrs does disclose convex shaped upper and lower surfaces, as best seen in FIG.1.; and as to the plurality of linear grooves formed in the convexly curved upper and lower surfaces, the first groove being parallel to the second groove, applicant's attention is again directed to FIG.6, where a groove is formed in the convexly shaped upper and lower surfaces. AS to the pair of grooves, Kohrs discloses in FIG.6 at least two pairs of grooves. As to the grooves being rounded, Kohrs discloses in FIG.6 that the grooves are substantially partially round. Therefore, the rejection of the claims over Kohrs is proper.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within


TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Pedro Philogene
March 23, 2007


PEDRO PHILOGENE
PRIMARY EXAMINER